ERNEST CHEONG YONG YIN

v.

KAMARIYAH HAMDAN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
VT SINGHAM J
[CIVIL SUIT NO: S-22-803-2004]
30 SEPTEMBER 2010

LEGAL PROFESSION: *Professional privilege - Communication between solicitors - Disclosure of invoice for professional fees to solicitor for opposing party in taxation proceedings - Whether invoice a privileged document under s. 126 Evidence Act 1950 - Whether there was a breach of contract - Whether privileged information*

EVIDENCE: *Privilege - Legal professional privilege - Communication between solicitors - Disclosure of invoice for professional fees to solicitor for opposing party in taxation proceedings - Whether invoice a privileged document under s. 126 Evidence Act 1950 - Whether there was a breach of contract - Whether privileged information*

The first, second and third defendants were advocates and solicitors carrying on legal practice under the name and style of Messrs Mah-Kamariyah & Partners ('MKP'). The fourth defendant, also an advocate and solicitor, was a partner in MKP when he represented the plaintiff in a civil appeal in which the plaintiff was the respondent. Following the dismissal of the appeal with costs, MKP sent the plaintiff an invoice ('P3') for their professional fees for handling the appeal. In the meantime, the plaintiff had proceeded to tax the bill of costs for the appeal. The firm that acted for the appellant, Messrs Che Mokhtar & Ling ('CML') filed an affidavit in the taxation proceedings to oppose the amount of costs claimed by the plaintiff by exhibiting a copy of P3 which the fourth defendant, had, upon request, sent to CML. The plaintiff claimed P3 was a privileged document under s. 126 of the Evidence Act 1950 ('the Act') and sued the defendants for damages for breach of contract for disclosing P3 to CML without his consent. Section 126(1) of the Act barred an advocate, in the course and for the purpose of his employment as an advocate by or on behalf of his client, from (i) disclosing any communication made to him or (ii) stating the contents or condition of any document with which he had become acquainted or (iii) disclosing any advice given by him to his client.

Held (dismissing the claim with costs):

(1) P3 could not be treated or included as a confidential document or one which contained any privileged information as envisaged or protected by s. 126 of the Act. It was just an invoice from MKP requesting the plaintiff to pay his solicitor's fees for services rendered. It did not contain any specific or confidential communication, advice or details between the plaintiff and MKP. (paras. 10 & 14)

(2) P3 did not arise in the course and for the purpose of MKP's professional employment. It was not introduced or prepared for use in any pending proceedings or trial which MKP was employed or retained to act or to give advice or represent the plaintiff. Hence, it was not within the recognised categories of privileged information or documents envisaged by s. 126 of the Act. (para 11)

(3) Even assuming P3 was confidential, the contents of that communication by the lawyer was not privileged information as it did not disclose the nature of the communication between the solicitor and his client or anything about the legal advice given to the client by the lawyer and does not contain any details as to the nature of the services and how it was performed or rendered. (para 16)

Case(s) referred to:

Ainsworth v. Wilding [1900]2 Ch 315 ***(refd)***
Alcoota & Anor v. CLC & Ors [2001] NTSC 30 ***(refd)***
Anderson v. Bank of British Columbia [1876] 2 Ch D 644 ***(refd)***
Cheah Cheng Hoc v. Public Prosecutor [1986] 1 CLJ 169; [1986] CLJ (Rep) 84 SC ***(refd)***
Cheong Heng Loong Goldsmiths (KL) Sdn Bhd v. Chan Kim Swi (Capital Insurance Bhd, Garnishee [1996] 1 LNS 112 HC ***(refd)***
Dato' Anthony See Teow Guan v. See Teow Chuan & Anor [2009] 3 CLJ 405 FC ***(refd)***
Dato' Au Ba Chi & Ors v. Koh Keng Kheng & Ors [1988] 1 LNS 188 HC ***(refd)***
Gundry v. Sainsbury [1910] 1 KB 645 ***(refd)***
Harold v. Smith [1860] 5 Hurlstone And Norman 381 ***(refd)***
How Paik Too v. Mohidieen [1967] 1 LNS 57 FC ***(refd)***
International Business Machines Corp And Another v. Phoenix International (Computers) Ltd [1995] 1 All ER 413 ***(refd)***
Janagi v. Ong Boon Kiat [1971] 2 MLJ 175 ***(refd)***
Jet Holding v. Cooper [2006] SGHC 20 ***(refd)***
Kruger Inc v. Kruco Inc [1988] RJQ 2323 ***(refd)***
Kupe Group Ltd v. Seamar Holdings Ltd [1993] 3 NZLR 209 ***(refd)***
Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***
Lee v. South West Thames Health Authority [1985] 1 WLR 845 ***(refd)***

Lim Chee Beng and Others v. R Rajasingam & Company and Anor [2008] MLJU 931 ***(refd)***
Malaysia National Insurance Sdn Bhd v. Malaysian Rubber Development Corp [1986] 2 CLJ 285; [1986] CLJ (Rep) 185 SC ***(refd)***
Maranda v. Richer [2003] 3 SCR 193 ***(refd)***
Natesan v. Goh Gok Hoon [1968] 1 LNS 86 FC ***(refd)***
NRG v. Bacon & Woodrow [1995] 1 All ER 976 ***(refd)***
O Mustad & Son v. Dosen [Note] [1964] 1 WLR 109 ***(refd)***
Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577 CA ***(refd)***
Quebec v. RC [2003] RJQ 2027 ***(refd)***
R v. Derby Magistrates' Court, ex parte B [1995] 4 All ER 540 ***(refd)***
Rex v. Chhoa Mui Sai [1937] 1 LNS 68 HC ***(refd)***
Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 3 CLJ 310 CA ***(refd)***
Re Merit Finance and Investment Group Ltd [1993] 1 NZLR 152 ***(refd)***
Regina Sylvia Beltran v. Chan Sit Yee [2002] 2 CLJ 379 HC ***(refd)***
Tan Eng Seong v. Malayan Banking Berhad [1997] 2 CLJ Supp 552 HC ***(refd)***
Tentat Singapore Pte Ltd v. Multiple Granite Pte Ltd And Others [2009] 1 SLR 42 ***(refd)***
Turton v. Barber [1874] LR 17 Eq 329 ***(refd)***
USP Strategies v. London General Holdings Ltd (No 2) [2004] 2 EWHC 373 ***(refd)***
Wang Sam Lin v. Burridge [2009] SGHC 252 ***(refd)***
Wheeler v. Le Marchant [1881] 17 Ch D 675 ***(refd)***
Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1991] 1 CLJ (Rep) 330 SC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 126(1), 128
Legal Profession (Practice and Etiquette) Rules 1978, rr. 16, 36

For the plaintiff - Wong Kok Leong (Zaini Bakar with him); M/s Skrine
For the defendants - Leong Wai Hong (Chan Yee Chong with him); M/s KL Wong

Reported by Ashok Kumar

JUDGMENT

VT Singham J:

[1] The plaintiff's claim is for damages on the ground that the defendants had released a privilege document, namely, an invoice (exh. P3) to a third party, namely, M/s Che Mokhtar & Ling. This privilege is claimed under s. 126 of the Evidence Act 1950.

Section 126(1) of the Evidence Act 1950 reads:

> No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.

[2] It would appear that s. 126(1) of the Evidence Act 1950 has got three categories or situations where the privilege applies, ie, any communication, document or advice. There is also the proviso that those protections will not apply as stated in (a) and (b) which is not relevant for the purpose of this case.

[3] The factual background of this case, briefly, *inter alia*, is, the first, second and third defendants who are advocates and solicitors under the Legal Profession Act 1976 were at all material time practising under the firm known as M/s Mah-Kamariyah & Partners. The fourth defendant, an advocate and solicitor under the Legal Profession Act 1976, at all material time was a partner of the said firm in the PJ Office. The fourth defendant subsequently left the said firm of M/s Mah-Kamariyah & Partners and started his own legal practice from March 2002 as the sole proprietor under the name of CM Phang & Co.

[4] The plaintiff had appointed the firm of M/s Mah-Kamariyah & Partners to represent him at the appeal at the Federal Court, Civil Appeal No: 03-02-2001. The appeal was handled by the fourth defendant who at the material time was the partner of the said firm at the PJ Office. The Federal Court which heard the appeal had dismissed with costs the appeal of UMBC. Upon the disposal of the appeal, the said firm of M/s Mah-Kamariyah & Partners had sent an invoice dated 31 December 2001 (P3) to the plaintiff being the professional fees for the Federal Court appeal.

[5] In the meantime, after the appeal was disposed off, the plaintiff, as the respondent in the Federal Court appeal had proceeded to tax the bill of costs. During the hearing of the taxation of the bill of costs, M/s Che Mokhtar & Ling, the legal firm who was acting for the appellant (UMBC) filed an affidavit to oppose the amount claimed by way of costs in the taxation proceeding by exhibiting a copy of the invoice (P3). Admittedly, the fourth defendant had sent a copy of the invoice (P3) upon request to the firm of M/s Che Mokhtar & Ling. Hence, the plaintiff had filed this suit against all the four defendants for damages for breach of contract pursuant to misconduct for disclosure of privilege document belonging to the plaintiff without the plaintiff's

consent and/or using the privilege document in court proceedings without seeking confirmation if the plaintiff's consent had been obtained. Basically and briefly that is the background facts in the present case.

[6] The agreed facts (encl. 41) and issues to be tried (encl. 42), are as follows:

Agreed Facts

1. The Plaintiff is an individual of a Malaysian citizen having an address at No. 37-2, Tingkat 2, Jalan Desa, Taman Desa Off Jalan Kelang Lama, 58100 Kuala Lumpur

2. The First Defendant, Second Defendant and the Third Defendant at the material time are Advocates and Solicitors registered at the High Court of Malaya under the Legal Profession Act 1976 and conducting their legal practice as partnership in a legal firm of Mah Kamariyah & Partners at No. 3, Persiaran Hampshire Off Jalan Ampang 50450 Kuala Lumpur (hereinafter is known as "MKP Legal Firm").

3. The Fourth Defendant at the material time was an Advocate and Solicitor registered at the High Court of Malaya under the Legal Profession Act 1976 and conducting his legal practice from March 2002 as a sole proprietor in the legal firm of Messrs CM Phang & Co having an address at No. 22B, Jalan SS 21/58, Damansara Utama, 47400 Petaling Jaya (hereinafter known as "CMP Legal Firm").

4. The Plaintiff had appointed MKP Legal Firm to represent him in an action in the Federal Court, Civil Appeal No: 03-02-2001 and the case was handled by the Fourth Defendant in which at the material time was one of the Partners in MKP Legal Firm.

5. MKP Legal Firm has issued an Invoice No. L/PCM/263 dated 31.12.2001 (hereinafter known as the "Invoice") to the Plaintiff.

6. CMP Legal Firm had given a copy of the Invoice to Messrs Che Mokhtar & Ling by a letter dated 16.12.2003.

Issues To Be Tried

1. Whether Invoice No. L/PCM/263 dated 31.12.2001 (The Invoice) from Mah Kamariyah & Partners ("MKP") to the Plaintiff is a privilege document protected under the common law principle of legal professional privilege and/or under section 126 of Evidence Act 1950?

2. Whether the Invoice rendered to the Plaintiff by MKP contains element of legal advice or matters of confidence between the solicitor and client?

A
3. Whether the Invoice rendered to the Plaintiff by MKP is a confidential information/falls within the category of documents protected by the legal professional privilege and/or under section 126 of the Evidence Act 1950?

4. If the answers to the above are in the affirmative, whether the
B Plaintiff is deemed to have waived privilege if he had exhibited a copy of the Invoice in legal proceedings against him by the Fourth Defendant and by MKP for payment of Invoice?

5. Whether if the Invoice is privileged under the common law and/ or under section 126 of the Evidence Act 1950, the release/
C disclosure of the Invoice is permitted under proviso (b) to section 126 (1) of the Evidence Act 1950?

6. Whether if the Invoice is privileged under common law and/or under section 126 of the Evidence Act 1950, the release/ disclosure of the Invoice is permitted as the Defendants are
D merely complying with the etiquette rules, rule 16 and 36 of the Legal Profession (Practice and Etiquette) Rules) 1978?

[7] In this jurisdiction, the Legal Professional privilege is provided by the Evidence Act 1950, in particular, s. 126 and of course s. 128. *Sarkar's Law of Evidence* has given detail write up supported by
E cases on this professional communication, advice and privilege document. (Refer to the case of *Dato' Au Ba Chi & Ors v. Koh Keng Kheng & Ors* [1988] 1 LNS 188 which had also considered *Sarkar's Law of Evidence* (10th edn). In *Wheeler v. Le Marchant* [1881] 17 Ch D 675 Jessel MR said at p. 682

F
> It is a rule established and maintained solely for the purpose of enabling a man to obtain legal advice with safety.

[8] The one and only issue which will determine this suit, is, whether the invoice (P3) is a privilege document as envisaged by s. 126 of the
G Evidence Act 1950. In other words, the issue concerns the scope of that privilege. Learned counsel for the plaintiff in his clear submissions had contended that the invoice (P3), is a privilege document and cannot be released without the express consent of the plaintiff as provided under s. 126 of the Evidence Act 1950. The following cases were referred to
H by learned counsel for the plaintiff:

(a) *Field's Commentary on Law of Evidence*, vol. 5, 12th edn, 2002

(b) *R v. Derby Magistrates' Court, ex parte B* [1995] 4 All ER 540

I (c) *International Business Machines Corp and Another v. Phoenix International (Computers) Ltd* [1995] 1 All ER 413

(d) *Dickinson (t/a Dickinson Equipment Finance) v. Rushmer (t/a FJ Associates) (transcript)* 21 December 2001

(e) *Turton v. Barber* [1874] LR 17 Eq 329

(f) *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor* [2009] 3 CLJ 405

(g) *Dato' Au Ba Chi & Ors v. Koh Keng Kheng & Ors* [1988] 1 LNS 188

On the other hand, learned counsel for the defendant had submitted otherwise and clearly that the invoice (P3) does not come under the ambit of s. 126 of the Evidence Act 1950. The following cases were relied on by learned counsel for the defendants:

(1) Augustine Paul, *Evidence Practice and Procedure*, 2nd Edn, MLJ s. 126(1) Evidence Act

The Meaning of "Advice" As Defined Under Legal Dictionaries

(2) *A Dictionary of Law*, 4th edn, Oxford University Press

(3) *Wharton's Law Lexicon*, 14th edn, Fourth Indian Reprint 1997, Universal Law Publishing Co Pvt Ltd

(4) *Words and Phrases Judicially Defined*, 1990 edn.

(5) *Stroud's Judicial Dictionary of Words and Phrases*, 13th Cumulative Supplement to the 5th edn, 1998

(6) *The New Shorter Oxford English Dictionary On Historical Principles*, Volume 1 A-M, 1993

(7) *Words and Phrases Judicially Defined*, 2nd edn, vol. 1 A-C, 1969

An Invoice Which Contains No Legal Advice Is Not a Privileged Document And Thus Not Protected By Legal Professional Privilege

(8) *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd v. Chan Kim Swi (Capital Insurance Bhd, Garnishee* [1996] 1 LNS 112

(9) *Sarkar's Law of Evidence*, vol. 2, 15 edn, 1999

(10) *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor* [2009] MLJU 0097

(11) *Phipson on Evidence*, 16th edn, 2005

(12) *International Business Machines Corp v. Phoenix International (Computers) Ltd* [1995] 1 All ER 413

A (13) *NRG v. Bacon & Woodrow* [1995] 1 All ER 976

(14) *Re Merit Finance and Investment Group Ltd* [1993] NZLR 152

(15) *Kupe Group Ltd v. Seamar Holdings Ltd* [1993] 3 NZLR 209

B (16) *Alcoota & Anor v. CLC & Ors* [2001] NTSC 30

Plaintiff Had Waived Privilege / Confidentiality Of The Invoice

(17) *Tentat Singapore Pte Ltd v. Multiple Granite Pte Ltd and Others* [2009] 1 SLR 42

C

Parties Are Bound by Their Pleadings And Are Not Allowed To Adduce Facts Which They Have Not Pleaded

(18) *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330

D

(19) *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 3 CLJ 310

(20) *Regina Sylvia Beltran v. Chan Sit Yee* [2002] 2 CLJ 379

E Plaintiff Does Not Comes To The Court With Clean Hands

(21) Michael J Cook, *Cook On Costs 2008*, Lexis Nexis Butterworth

(22) *Harold v. Smith* [1860] 5 Hurlstone and Norman 381

F (23) *Gundry v. Sainsbury* [1910] 1 KB 645, Court of Appeal

(24) *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577

Objection To Hearsay Evidence

G

(25) *Malaysia National Insurance Sdn Bhd v. Malaysian Rubber Development Corp* [1986] 2 CLJ 285; [1986] CLJ (Rep) 185

The Fourth Defendant Is Permitted To Release The Invoice In Order To Prevent A Breach Of The Legal Profession Act 1976

H

(26) Rules 16 and 36 of the Legal Profession (Practice and Etiquette) Rules 1978

(27) *Cheah Cheng Hoc v. Public Prosecutor* [1986] 1 CLJ 169; [1986] CLJ (Rep) 84

I

(28) *Lawyers' Professional Responsibility in Australia and New Zealand*, 2nd edn, LBC Information Services 2001

Disciplinary Board's Decision Constituted *Res Judicata* Against The Plaintiff

(29) *Lim Chee Beng and Others v. R Rajasingam & Company and Anor* [2008] MLJU 931

Plaintiff Did Not Suffer Any Damage

(30) *Jet Holding v. Cooper* [2006] SGHC 20

(31) *Wang Sam Lin v. Burridge* [2009], SGHC 252 at para 60

(32) *Tan Eng Seong v. Malayan Banking Berhad* [1997] 2 CLJ Supp 552 at 569

[9] The spirit and object of the provision of s. 126 of the Evidence Act 1950 is to protect the confidentiality of information or legal advice or documents exchanged between a client and his or her solicitor. (See *Anderson v. Bank of British Columbia* [1876] 2 Ch D 644 at p. 649).

[10] It is important to consider that s. 126 of the Evidence Act 1950 refers to admissibility of communication, advice given and document and more importantly, for the protection of the client, namely, of any privileged communication. The invoice (exh. P3) which was from the plaintiff's previous solicitors M/s Mah-Kamariyah & Partners and sent to the plaintiff to pay the professional fees did not contain any specific communication, advice or details between the plaintiff and his previous said solicitors. It was just an invoice, a note from the plaintiff's previous solicitors to the plaintiff, the client, requesting the plaintiff to pay his solicitor's fees for services rendered. In the considered view of this court, and with respect, the invoice (P3) cannot by any stretch of the imagination be treated or included as a confidential document or which contains any privilege information as envisaged or protected by S126 of the Evidence Act 1950. In determining whether the invoice (P3) is in fact a privilege document, this court has to look at the substance and reality of the document (P3) itself and not just the label and the circumstances in which it came into existence.

[11] The invoice (P3) which originated from the plaintiff's previous solicitors did not arise in the course and for the purpose of the solicitor's professional employment. This court finds that the invoice (P3) which was sent by the plaintiff's previous said solicitors to the plaintiff to pay the fees for the professional services rendered is not within the recognised categories of privilege information or document as envisaged by s. 126 of the Evidence Act 1950. The invoice (P3) was not introduced or prepared for use in any pending proceedings or trial which the plaintiff's previous solicitor was employed or retained to act or to give advice or represent the plaintiff.

[12] The fact that the learned Registrar in the taxation proceedings had ordered the copy of the invoice (P3) to be expunged from the affidavit affirmed by the appellants in the Federal Court appeal, as testified by the plaintiff, with respect to the admissibility on the ground that it is a privilege document is not a decisive consideration for the purpose of this suit, first, the ruling is not binding on this court for the purpose of deciding this suit which is basically for this court to consider and interpret s. 126 of the Evidence Act, 1950, secondly, the plaintiff has admitted that the invoice (P3) does not contain any advice, thirdly, it does not contain any confidential information and fourthly, it has been brought to public domain as a copy of the invoice (P3) had in fact admittedly been exhibited by the plaintiff himself to his affidavit affirmed on 11 February 2003 and marked as exh. 'ECYY 9' in that affidavit in the Summons (P8) filed by the fourth defendant at the Magistrate's Court for the professional fees as contained in the invoice P3 which then had remained unpaid. (See *Ainsworth v. Wilding* [1900]2 Ch. 315, *O Mustad & Son v. Dosen [Note]* [1964] 1 WLR 109).

[13] The word 'privilege' used in s. 126 cannot be considered or read in isolation but must necessarily be read together with the word 'confidentiality' as both are interrelated and intertwined.

[14] In order for litigation privilege to apply, there must be confidential communication between client and solicitor made for the dominant purpose of the case in litigation. (See *Lee v. South West Thames Health Authority* [1985] 1 WLR 845 at p. 850). The invoice (P3) which was sent to the plaintiff is a document or note of the solicitor and not of the client. The contents of P3 does not contain any advice or confidential communication between the plaintiff and his previous solicitors in the course and for the purpose of the solicitor's employment. In fact as this court has said, the entire provision of s. 126 must be read together with the invoice P3 and if both are read together, there is nothing in s. 126 of the Evidence Act, 1950 which had referred or intended to refer to a document, being the invoice (P3) in particular, the contents of (P3). The invoice, P3 did not also refer to any communication of agreement between the plaintiff and his previous solicitors as to the amount of fees agreed. The plaintiff had testified that there was no agreement with his previous solicitors as to the amount or fees as this was not even discussed. In other words, P3 does not even contain any agreement or communication between the plaintiff and his previous said solicitors or any advice or any matter related to the employment of the solicitor. By the invoice (P3), the solicitor had merely required the plaintiff for payment for the professional services rendered. The lid of confidentiality cannot be stretched or extended to a

bare statement where P3 merely has quoted a certain sum to be paid towards fees for services rendered. Even if P3 is labelled as an invoice, it is still not a relevant factor as what is important is the substance or contents of P3 and not the label itself.

[15] It is important to state that the decision of this court is based on the interpretation of s. 126 of Evidence Act, 1950 and read with exh. P3, whether there was any breach committed by the defendants in respect of s. 126 of the Evidence Act, 1950. The decision of this court is not influenced by the decision of the disciplinary board, (D14), or the ruling of the learned Registrar in the taxation proceedings which had expunged the copy of the invoice P3 for the purpose of taxation. The decision of this court is based solely on the evidence and the contemporaneous documents and the interpretation of S126 of the Evidence Act 1950.

[16] The contents of P3 did not contain any privilege information which might jeopardise the confidentiality of any legal advice given to the plaintiff. Further the amount of fees and disbursements charged by the solicitors did not provide any information as to the detailed nature of the work done or the services rendered. (see *Kruger Inc v. Kruco Inc* [1988] RJQ 2323 (CA)). In any event, and assuming that the invoice (P3) as to the payment of fees is regarded as confidential, the contents of that communication by the lawyer is not a privilege information as the contents had not disclosed the nature of the communication between the solicitor and his client or anything about the legal advice given to a client by a lawyer and does not contain any details as to the nature of the services and how it was performed or rendered. (See the case of *Quebec v. RC* [2003] RJQ 2027 (Court of Appeal)).

[17] The protection covered by s. 126 is basically to refer to communication between solicitor and client and must necessarily be for the purpose of enabling the client to communicate with his or her solicitor and obtain the necessary advice in respect of the brief intended or handed to the solicitor. Therefore, in the considered view of this court, P3 and the contents do not fall within the ambit of the privilege communication as envisaged by s. 126. Section 126 among others, basically refer to solicitors who cannot be compelled to provide, disclose or divulge any information which has transpired or communicated between solicitors and client in the course and for the purpose of his employment but for the exceptions as contained in the proviso which does not concern the present case by the plaintiff.

[18] The scope of the privilege conferred by s. 126 of the Evidence Act 1950 merely sets out the matters which are relevant for the purpose of communication between solicitor and client. However, the communication, and the document in the respectful view of this court,

is not exhaustive or the boundaries of the privilege as conferred by s. 126 of the Evidence Act is not watertight. Section 126 of the Evidence Act 1950, contains three situations but it does not mean that this court must give a watertight definition or accepted as a blanket rule as not all communications by all clients are protected by the professional privilege. What is important is the nature of the contents and the context in which the communication, in the present case, the invoice (P3) was sent to the plaintiff. In order to consider whether the invoice would give rise to a professional privilege, this court has to consider the contents of P3. P3 has nothing to do with any advice which the solicitor may have given to his client. (See *Solosky v. The Queen* [1980] 1 SCR 821 at p. 837) where Dickson J had laid down three situations as in s. 126:

(i) a communication between solicitor and client;

(ii) which entails the seeking or giving of legal advice; and

(iii) which is intended to be confidential by the parties.

[19] This court finds that the amount or fees and disbursement as contained in P3 does not provide any legal advice. When a lawyer submits the bill or invoice of account to a client, he or she does so as a supplier of a service. The lawyer's relationship with the client is one of creditor to debtor. The amount owing takes on an identity distinct from the service itself. (see *Maranda v. Richer* [2003] 3 SCR 193) where the judgment of the Court of Appeal was delivered by LeBel J] In the circumstances, P3 does not merit the protection conferred or as envisaged by s. 126 of the Evidence Act, 1950 (see also *USP Strategies v. London General Holdings Ltd (No 2)* [2004] 2 EWHC 373 (Ch) April 30, 2004, Times). It is the considered view of this court that the plaintiff cannot extend the umbrella of the protection given to him under s. 126 of the Evidence Act, 1950 to this invoice P3 which was sent to the plaintiff by his previous said solicitors as the same is not covered by s. 126 of the Evidence Act 1950. (see *Re Merit Finance and Investment Group Ltd* [1993] 1 NZLR 152, *Kupe Group Ltd v. Seamar Holdings Ltd* [1993] 3 NZLR 209).

[20] However, it might be a different situation indeed, if the invoice had contained details or narration of the type or nature of the advice given, and the communication between them. In those circumstances, might probably, the plaintiff's claim may have some basis which might be subject to professional privilege. Nevertheless, in the present case, P3 is not or does not contain any advice or details as admitted by the plaintiff and that P3 does not contain any advice or communication. It

is simply a claim or rather simply a bill sent to the plaintiff seeking the previous client to pay the fees for services rendered. (see *Rex v. Chhoa Mui Sai* [1937] 1 LNS 68).

[21] In the circumstances, and having considered the cases referred to by both parties, this court would answer the issues:

First issue, the answer is in the negative.

Second issue, the answer is also in the negative.

Third issue, this answer is also in the negative.

Accordingly, and in view of the decision of this court on this three issues, this court is of the considered view that it is not necessary to decide on issues 4, 5 and 6 as the document (P3) itself does not come under the ambit of s. 126 of the Evidence Act 1950.

[22] Be that as it may, on the question posted by this court during the submissions of learned counsel for the plaintiff, that, in some cases, the solicitor's bill or invoice which has not been settled, may be handed to another solicitor to file a suit on behalf of the unpaid solicitor. In those circumstances, can that unpaid lawyer be held to have disclosed a privilege document as alleged, namely, a copy of the invoice. Surely the answer is 'no'. However, with respect, there was no response from the learned counsel for the plaintiff which means that, the invoice as in this case, cannot be a privilege document for reasons which this court has advanced above after having closely considered the provision of s. 126 of the Evidence Act, 1950 and the contents of P3. This court is satisfied that the invoice (P3) was not created by the plaintiff's previous solicitors to give any legal advice or assistance to the plaintiff and neither does it contain or refer to any particular nature of advice given to the plaintiff or communication between the said solicitor and client during the time of the employment or in the course and for the purpose of his employment as such advocate. Accordingly, on this ground itself, this court is of the considered view that the invoice (P3) cannot be accepted as a privilege document.

[23] On the other hand, even if the copy of the invoice (P3) was sent to M/s Che Mokhtar & Ling out of vengeance or malicious intent by the fourth defendant where there is insufficient evidence to support that allegation, it is still not a relevant factor in determining the legal issue posted in this case. The issue of malicious intent as raised by the plaintiff is a separate matter between the plaintiff and his previous solicitors or the fourth defendant and is not a relevant factor or the pleaded case in this cause of action by the plaintiff. As admitted by the

plaintiff, the statement of claim did not plead any malicious intent against the defendants and this court cannot decide or grant any relief which is not the pleaded case of the plaintiff. (See *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1991] 1 CLJ (Rep) 330) and *Ranjit Kaur Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 3 CLJ 310, *Natesan v. Goh Gok Hoon* [1968] 1 LNS 86; [1968] 2 MLJ 3 at p. 8, *How Paik Too v. Mohidieen* [1967] 1 LNS 57; [1968] 1 MLJ 51 at p. 52, *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 175, *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239).

[24] On the issue of *res judicata*, and for the sake of completion, this court does not have the benefit of knowing the reasons of the disciplinary board's decision for having dismissed the plaintiff's complaint. Hence, this court would not be in a position to decide whether this suit is caught by the doctrine of *res judicata* as raised by the learned counsel for the defendants on the ground that the disciplinary board had already dismissed the plaintiff's complaint. In any event and in view of the decision of this court on P3, there is no real necessity to decide on the issue of *res judicata* as raised by learned counsel for the defendants.

[25] There was another issue which was raised by learned counsel for the plaintiff, namely, the taking of files from M/s Mah-Kamariyah & Partners by the fourth defendant when he left the firm. This court finds that this is also not an issue for the purpose of determining whether the invoice (P3) was a privilege document in the present case because the taking of the files concerning the plaintiff's cases and that it was released without the plaintiff's consent is a matter between the partners of M/s Mah-Kamariyah & Partners and the fourth defendant and does not concern the issues as agreed to be decided by this court. The taking of the files is not a relevant matter to be decided as the plaintiff's claim against the fourth defendant is based solely on the copy of the invoice (P3) which was sent to M/s Che Mokhtar & Ling in the taxation proceedings and does not refer to the entire file or files or other documents which were handed to the fourth defendant by M/s Mah-Kamariyah & Partners. The cases referred to and relied on by learned counsel for the plaintiff, the facts and surrounding circumstances can be distinguished apart from the legal principles which are binding upon this court and does not assist the court to determine this particular document P3.

[26] In the circumstances, and in accordance with reasons and justice and on the facts and surrounding circumstances in the present case, the plaintiff's claim against the defendants is dismissed with costs.